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ABSTRACT

Many people in our society turn to courts for the resolution of every problem. By delegating to judges the authority to declare our legal rights we diminish our individual and collective liberties. This trend of legalism can have important consequences for school administrators. Rather than resist or evade the law, school officials can obviate judicial intrusion by employing several approaches. Administrative channels already in existence within the school system offer the most obvious means for resolving conflict. Another approach is the formation of a grievance committee, composed of people of divergent perspectives that can be called in when administrative channels prove unsatisfactory. Arbitration, in which an impartial third party conducts binding or advisory fact finding, is yet another alternative. A final mechanism is the use of the ombudsperson, an in-house arbiter found in larger institutions. These alternatives can be costly in terms of time and energy but may prevent many disputes from reaching an advanced stage. (JEH)

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AVOIDING THE COURT OF FIRST RESORT

Dennis Dailey Murphy, J.D., Ph.D.

Most articles dealing with school law tend to take one of two tacks: either the school administrator or board member is cautioned against taking this or that action because it may engender a debilitating lawsuit, or the teacher or student is apprised of new extensions or further clarifications of the rights appurtenant to his/her status. An assumption of an adversary relationship underlies these approaches. The purpose of this article is to examine this assumption because such a relationship often does, in fact, exist in contemporary American schools and society.

The heart of the matter is that society and schools are both essentially cooperative rather than contentious ventures. A systems perspective helps the administrator see both society and schools as social systems, each a *purposive* whole comprising a set of interrelated and generally harmoniously interacting parts. The theory-minded school administrator recognizes that some conflict, such as that reflected or engendered by collective bargaining, can be functional in an organization. Societal notions of individual liberty, moreover, embrace conflict in moderation as healthy for society.

In considering school law the school administrator should never lose sight of the basic *purposes* of schools. Schools exist to meet both the consumer needs of children and the self-perpetuation needs of society. In focusing upon school law articles, constitutional provisions, statutes, administrative rules and regulations, and court decisions, the school administrator should recognize one manifestation of our contemporary adversary climate. This is the current phase of *acute legalism* that prompts otherwise reasonable Americans to turn to the courts for judicial relief from every conceivable interest or value conflict, real or imagined.

Our hallowed notions of liberty and equality have been transformed through a perverse convolution of democratic ideals into a new view of social and civil behavior wherein the exaltation of our civil rights too often obscures even minimal recognition of our civil obligations. Too many Americans seem to feel little obligation to settle their disputes and resolve their conflicts themselves. They seek liberty without responsibility. Many Americans turn to the courts for the answer to every problem and expect not only justice but also wisdom to suffuse the reply. But by so doing have they not often defaulted in their obligation for personal and social responsibility?

"Wisdom," according to the *Oxford English Dictionary*, is "the capacity of judging rightly in matters relating to life and conduct."[1] In failing to recognize and maximize each individual's capacity for wisdom, we bypass the individual's responsibility to make his/her own reasoned judgments. By delegating to judges the authority to declare our legal rights in *all* such matters, we are diminishing, not enhancing, our individual and collective liberty. In turning at every opportunity to the courts, we are denigrating—indeed, denying—our fundamentally human capacity to solve our own problems and to function as reasonable, intelligent social beings. We anticipate and then applaud a well-reasoned judicial opinion, rarely recognizing that the capacity for reasoning and for reasonableness is within each of us. This plea for individual responsibility should not be dismissed as a plaintive cry for return to outmoded values. Such a simplistic assessment, in fact, demonstrates another dimension of the core problem: part of the reason that we choose not to solve our own problems ourselves is that we choose not to think through problems for ourselves. For educational administrators, problem solving is a key activity. By use of what may be called the Law of Conservation of Conflict, problems not thought through rarely go away; they remain to confront someone, often the school executive. Training and experience in problem solving for educational administrators should prepare them to think through their problems, analyze the conflict, and attempt to settle disputes.

While this failure to think through our problems results in a general societal concern, we need to ask "What consequence of this phase of acute legalism most directly affects the school administrator?" Surely the effective administrator will be cognizant of the basic law affecting operation of the school and will institute a style of practiced awareness in regard to changes and developments in such law. But the most effective administrator will not be shackled by legal-bureaucratic constraints nor tied down and rendered incapable of flexible action by the Gordian knot of legal technicalities. Like Alexander, the effective administrator will not engage in futile attempts to untie the knot but will cut forthrightly and cleanly through it. When in doubt he/she will drive ahead, not hesitating to make intelligent decisions and to take rational actions accordingly.

It is not submitted that the effective administrator ignore, resist or evade the law; such a posture is indefensible and rightly so. It is submitted that an informed administrator acting reasonably need not fear the litigiousness of the day. Trepidation

[1]*The Compact Edition of the Oxford English Dictionary* (New York: Oxford University Press, 1971), vol. II, p. 3,794.

and paralyzing fear are no better than the arbitrariness and capriciousness too often found in an earlier day. Judges, no less than teachers, parents, and students, will respect the judgment of the administrator displaying unimpeachable professional conduct and impeccable good faith. These ethical and legal imperatives are characteristic of the effective administrator of any day.

The key remains, however, the resolving of conflict and the settling of disputes before recourse to the courts is sought. Several such mechanisms obviating judicial intrusion into the operation of schools come to mind. It is suggested that school conflicts and disputes, posited in the context of the adversary climate and nonthinking of the day, can be successfully resolved through the proper use of presently existing administrative channels, through formation and use of general grievance committees, through appointment and use of advisory or binding arbitration, and through adoption and use of an ombudsperson. Other than the first of these, all presuppose that the administrator has done all he/she can to solve the problem but has met with limited or no success.

Administrative channels (including ultimate school board decisions), which are already in existence in virtually all school systems, offer the most obvious means for resolving conflicts and settling disputes before they reach the point of mutual intransigence that signals the filing of a lawsuit. Why are such channels presently inadequate? The question should be, "Why are such channels *perceived* as presently inadequate?" because they, in fact, can and do work.

Line administrators resolve numerous minor conflicts and frequently settle major disputes through application of their formal authority within prescribed administrative channels on a daily basis. Many nascent problems are typically soived by administrators through the informal practice of sound interpersonal relations. It would seem that the matters that do evade either informal or formal resolution and wind up in the courts could often be resolved by greater administrator attention to the development and practice of effective human relations skills.

Such skills necessarily involve a genuine concern for people and an ability to communicate clearly. These are much of what was earlier termed good faith and professional conduct, but the fact remains that not every administrator, especially not one in a highly charged political or collective bargaining setting, will be able to develop the human relations skills or judgment sufficient to deal effectively with all problems potentially bound for the courts. Institutionalization of alternative conflict resolution and dispute settlement mechanisms is usually needed.

A general grievance committee, not to be confused with any step or forum within a collective-bargaining grievance procedure, is a possible alternative problem-solving mechanism to be called into operation when administrative channels prove unsatisfactory but before recourse to the courts is sought. When vested with sufficient authority, such bodies can be effective in resolving conflicts, often because all that is needed is an open airing of the problem. Practical problems arise beyond the initial discomfort some administrators have with outside decision-making bodies.

The first problem with grievance committees is twofold—size and membership. Such committees should be large enough to include people with divergent perspectives, yet not so large as to be unwieldy. Given an appropriate size, the problem of committee membership becomes critical. Though the single criterion for membership should be fairness, political and collective bargaining considerations and administrative expediency may, in fact, determine the composition of the committee. Blatant, or even latent, conflict of interest can result, and the critical element of objectivity is lost.

The base issue, however, is one of authority. How much authority should—and can—an administrator or school board delegate to such a body? Such a committee should be seen as a dispute-settlement mechanism interposed between the administrator, who has already tried to settle the matter, and the school board, usually the final arbiter reached before a suit is filed in court. However, an argument can be made to allow appeal to such a committee after school board action rather than before although this arrangement is fraught with complications that may render it unworkable or illegal.

The committee should have as much authority to solve the particular grievance as is held by the administrator, but generally should not be seen as a quasi school board. The purpose of such a body, it must be remembered, is to resolve conflicts and settle disputes. If the committee succeeds in this purpose, the grievants will neither sue nor petition the school board for a hearing; both legal repercussions and political problems could, thereby, be avoided.

Arbitration is yet another alternative to the judicial process for conflict resolution and dispute settlement within a school district. Arbitration is extraorganizational, impartial, third-party intervention in a dispute. Those who question the applicability to the typical school dispute setting of what has traditionally been a collective bargaining mechanism are invited to examine the work done by the Division of Community Dispute Services of the American Arbitration Association. Although the technical meaning of arbitration denotes a binding effect, one occasionally encounters so-called advisory arbitration, otherwise known as fact-finding.

Fact-finding is a form of mediation wherein the impartial third party reviews the situation and renders a recommendation based upon his/her finding of fact. Although this recommendation can be spurned by one or more parties, there is a certain aura of legitimacy to it; what, indeed, does a fact-finder find, if not facts?

Binding arbitration derives its legitimacy primarily from the express prior agreement of the parties to abide by the decision. It is not unlike the decision of a court of last resort: the person rendering the decision is disinterested, and the parties will not appeal beyond. The advantages, of course, to such arbitration is that it avoids the court of first resort as well!

A final alternative mechanism for conflict resolution to be considered here, again evincing the impartiality of third-party intervention, is the ombudsperson. The difference between the ombudsperson and an arbitrator is simply that the former is in-house. In operation they are functionally equivalent. At present, ombudspeople are found more frequently in universities than in other educational institutions, but they could prove of great value to school districts, especially those larger districts more able to afford an additional full-time staff member. It is possible for a part-time ombudsperson to exist, but if such a person is employed additionally in the district, the conflict of interest problem that arose with grievance committees can surface again. If seen not only as an alternative to expensive litigation but also as a positive part of the organization that reduces conflict and thus smoothes the way for goal attainment, the use of an ombudsperson emerges as a fiscally prudent and educationally sound strategy.

These alternative mechanisms for dispute settlement are illustrative of the kinds of approaches school administrators can

use to minimize the frequency of lawsuits against educational agencies and educators. There are others which the enterprising and innovative educational administrator could conceive and implement to resolve conflicts and settle disputes before they get out of hand.

The highlighted approaches are not without drawbacks, of course; for example, grievance committees and arbitration are costly in terms of time and energy. One must remain ever mindful, nevertheless, that development and practice of effective human relations skills can forestall many disputes before they reach an advanced stage.

It has been said that the law will protect the fool, but it will not protect the *damn* fool. The effective school administrator will be neither, for this person, above all, recognizes his/her capacity for wisdom. The administrator thinks through problems and appreciates the value of solving school conflicts at the school level. School administrators should never lose sight of the purpose of the school and of education generally, the education of future citizens.

It is to be hoped that through the example of effective administrators and dedicated teachers, citizens will themselves recognize and begin to fulfill their own individual capacity for wisdom. Perhaps they will leave only cases within the proper judicial province for the courts so that courts will once again become the final, not initial, arbiter of disputes and conflicts that contending parties have already tried reasonably and earnestly to settle on their own. Can lawyers give wiser counsel?

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